



Marc Poston
Acting Public Counsel

State of Missouri

Mike Parson
Governor

Office of the Public Counsel
Governor Office Building
200 Madison, Suite 650
PO Box 2230
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <https://opc.mo.gov/>
Relay Missouri
1-800-735-2966 TDD
1-866-922-22959 Voice

January 1, 2019

Mr. D. Adam Crumbliss
Chief Clerk of the House
201 West Capitol Ave, Room 317
Jefferson City, MO 65101

Ms. Bev Cain
Secretary of the Senate
201 West Capitol Ave, Room 325
Jefferson City, MO 65101

2018 Report of the Ombudsman for Property Rights

The Office of the Ombudsman for Property Rights, created in 2006 by House Bill 1944 and located within the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures.” Mo. Rev. Stat § 523.277. The Ombudsman is further required by § 523.277 to document the use of eminent domain within the state, along with any issues associated with its use, and submit that information in an annual report to the General Assembly on January 1 of each year.

Missouri property owners contacted the Ombudsman over 35 times in 2018, resulting in more than 50 hours spent reviewing a wide variety of eminent domain questions. The guidance provided by the Ombudsman included, but was not limited to, the following issues:

- statutory provisions, case law, rules of civil procedure, constitutional provisions, and other legal authority concerning the topic of condemnation;
- the jurisdictional limitations of our office including that we do not have the power to represent individuals in condemnation proceedings, even in situations where the cost to litigate preclude access to justice;
- the procedural timeframe involved in the condemnation of property;
- the valuation of property subject to condemnation;
- the valuation of a partial taking as compared to the valuation of a full taking;
- the requirement of a condemning authority to negotiate with property owners in good faith prior to filing a petition for a condemnation order;
- the significance of the enactment of 394.080 and 394.085, RSMo, dealing with new legislation in relation to electric cooperatives and broadband communications;
- the legal authority to bring a private lawsuit when an entity caused damages to a property owner through trespass or inverse condemnation or refusal to follow Chapter 523;
- the heritage value of property taken by eminent domain; and
- the process of selecting the commissioners in a condemnation proceeding.

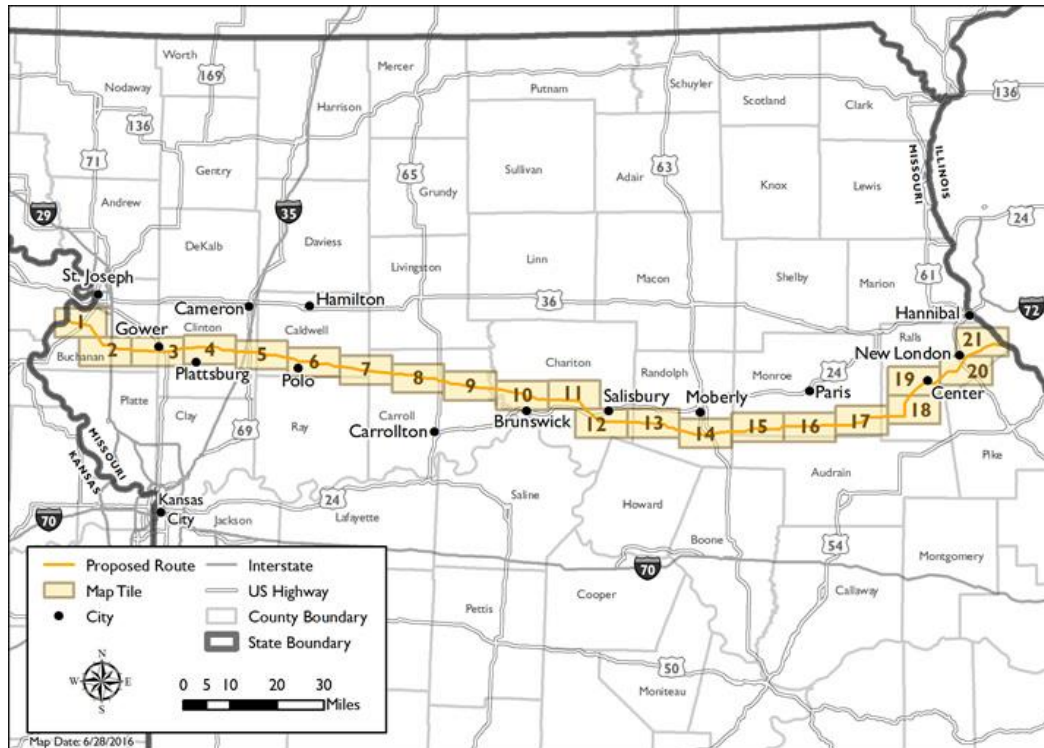
The below data includes summaries of specific projects involving eminent domain and summaries of relevant Missouri and Federal case law regarding eminent domain.

A. Status of Missouri Projects Involving Eminent Domain in 2018.

1. Grain Belt Express

The Grain Belt Express Clean Line is a \$2.35 billion proposed construction project for approximately 780-miles of overhead, direct current transmission line that would deliver wind energy from western Kansas to various utilities in Missouri, Illinois, Indiana, and other neighboring states. The project is designed to convey roughly 4,000 megawatts of energy, of which 500

megawatts would be eligible for utilization in Missouri and the remaining 3,500 megawatts delivered to the states further east. The Missouri portion of the project would cover nearly 206 miles across northern Missouri and would affect the following counties: Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls. Grain Belt's proposed route is as follows:



In 2015, the Missouri Public Service Commission (“PSC”) denied the request for a certificate of convenience and necessity authorizing Grain Belt Express Clean Line, LLC (“Grain Belt”) to construct the proposed transmission line. (PSC Case No. EA-2014-0207). The PSC reached this decision based on its conclusion that Grain Belt failed to satisfy its burden to demonstrate that the project was necessary or convenient for the public.

In 2016, Grain Belt filed a second application with the PSC requesting approval of the project (PSC Case No. EA-2016-0358). In this new filing, Grain Belt offered updated information by claiming that they had entered into a transmission service agreement with the Missouri Joint Municipal Electric Utility Commission, which had agreed to purchase 225 megawatts of capacity for the project.

The PSC entered a report and order for case No. EA-2016-0358 on August 16, 2017. In its report, the PSC noted that by 2012 Grain Belt had already obtained initial county assents for the project from all eight of the affected counties. However, the PSC went on to note that in 2014 the county commissions of Clinton, Chariton, Caldwell, Ralls, and Monroe counties attempted to rescind the previously granted county assent. Relying on the Western District's *In re Transmission Co. v. PSC* decision as controlling authority, the PSC denied Grain Belt its certificate of convenience and necessity because Grain Belt failed to establish that it had obtained county assents from each county affected by the project before approval.

Grain Belt appealed the decision of the PSC to the Missouri Court of Appeals for the Eastern District. (ED105932). On review, the Eastern District observed that the statutory language that required utilities to seek a certificate of convenience and necessity from the PSC recognized two distinct types of certificates: line certificates and area certificates. The Eastern District further noted that the *In re Transmission Co. v. PSC* decision, in which the Western District had reversed the PSC's granting of a line certificate based upon a failure by the utility to acquire full county consent, had relied solely on the area certificate statutory language in reaching its conclusion. Based on these two observations, the Eastern District concluded that the Western District's *In re Transmission Co. v. PSC* case was incorrectly decided and that a utility seeking only a line certificate was under no obligation to seek county assent. The Eastern District consequently reversed the PSC's decision.

The Clean Line case is now before the commission on remand. A second evidentiary hearing was held on December 18th and 19th and the parties initial briefs are due to be received January 9th of this year.

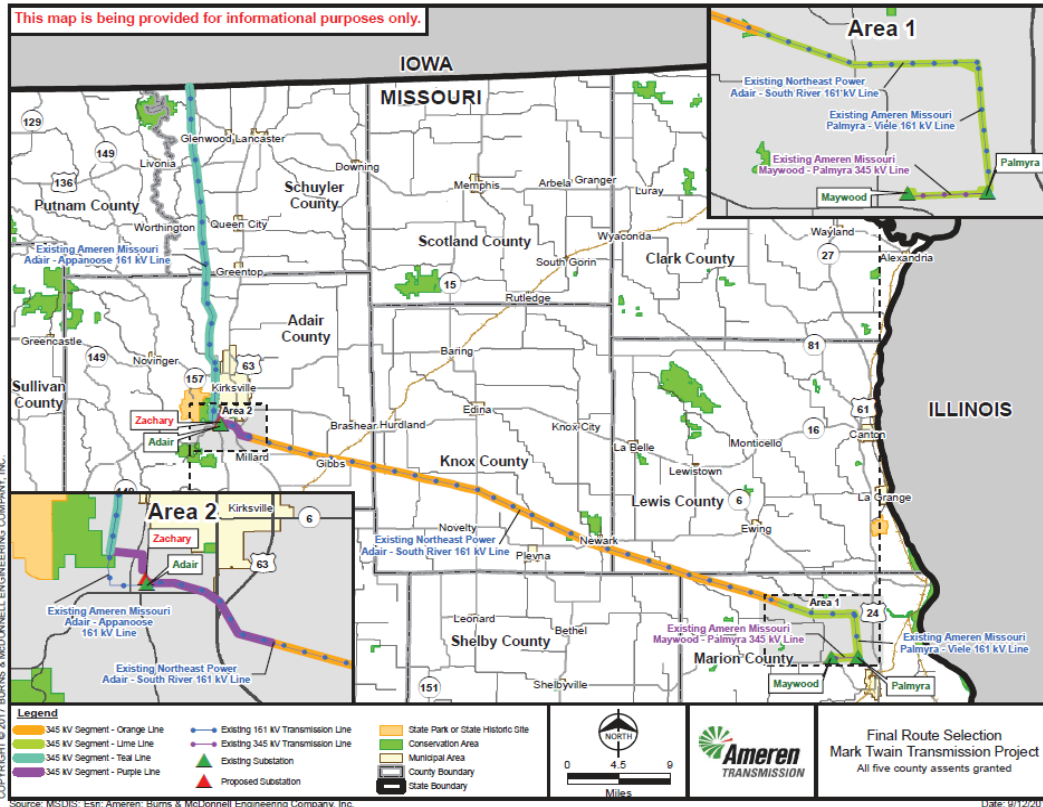
2. Mark Twain Transmission Project

In May of 2015, the Ameren Transmission Company of Illinois ("ATXI") filed an application with PSC seeking authority to build and operate a 345,000 volt electric transmission line in northeast Missouri, which it named the Mark Twain Transmission Project (PSC Case No. EA-2015-0146). The 97-mile

transmission line was proposed to run from a new Maywood Switching Station near Palmyra, Missouri, through Marion, Shelby, Knox and Adair counties to a new Zachary Substation, located near Kirksville. It would then turn north into Iowa through Adair and Schuyler Counties. The project would have required a 150-foot easement across private land for approximately 95 miles and a 100 foot easement for two miles.

In April of 2016, PSC issued a Report and Order that authorized ATXI to build its proposed transmission line. However, this authorization was conditioned upon ATXI receiving assent from all five of the affected counties, which ATXI was unable to acquire. ATXI subsequently appealed the Commission's decision to Missouri Court of Appeals for the Western District. (WD79883). After reviewing the case, the Western District vacated the PSC's order as it determined the PSC had exceeded its statutory authority. No further action was taken in the case. Instead, ATXI filed a new case in 2017 that proposed a new route.

The new route proposed by ATXI would pass through Schuyler, Adair, Knox, Lewis, and Marion Counties and mostly relied on existing transmission easements owned by Northeast Missouri Electric Power Cooperative and Union Electric Company d/b/a Ameren Missouri.



ATXI filed for a certificate of need or necessity on September 15, 2017. (Case No. EA-2017-0345). This case was settled through a unanimous stipulation and agreement that was approved by order of the PSC on January 10, 2018.

B. Other Eminent Domain Cases in Missouri Appellate Courts in 2018.

1. *Scott Family Props., LP v. Mo. Highways & Transp. Comm'n*, 546 S.W.3d 605 (Mo. App. ED 2018)

Scott Family Properties (Scott) owns an office building adjacent to I-64 in Chesterfield. In 2015, the Missouri Highway and Transportation Commission (the Commission) decided to erect a sound wall on the narrow strip of property (which it owned) between Scott's building and the highway. Scott was not provided notice or an opportunity to comment as provided by Missouri Department of Transportation policy. Soon after the wall was constructed, Scott filed an action for inverse condemnation based on nuisance against the Commission claiming that the sound wall obscured the view of his property thus

diminishing his ability to attract tenants.¹ The Commission responded by moving to dismiss Scott's claim on the grounds that Missouri law does not recognize a protectable interest in public visibility. The trial court granted the Commission's motion to dismiss and Scott appealed to the Missouri Court of Appeals for the Eastern District.

The Eastern District began its analysis by laying out the elements for a claim of inverse condemnation based on a nuisance. Specifically, the Court noted that a successful nuisance claim required: (1) notice by the complaining landowner, (2) the other's unreasonable operation in spite of notice, (3) injury, (4) damage, and (5) causation. The Court then turned to Scott's sole argument on appeal, which was that the Commission had built the sound wall unlawfully (and thus unreasonably) because it failed to follow certain procedures requiring notice and public comment. The Court quickly dismissed this claim noting that the procedures Scott was relying on were not codified under Missouri law, but rather, were stated in the Engineering Policy Guide published by MoDOT in accordance with Federal Highway Administration Noise Standards. This policy guide, the court pointed out, had been created to meet a criteria required for federal funding, and the Commission's non-compliance with it, while perhaps subject to federal scrutiny, was not "unlawful" in a manner necessary to give rise to an action in tort.

The Eastern District did not stop at determining that Scott's argument regarding unreasonableness was wrong. Instead it went on to state that even if the court accepted Scott's premise that the Commission's procedural omissions were unlawful (or at least unreasonable) Missouri law would still preclude an affirmative finding for the third element: injury. This was because a claim of inverse condemnation required the landowner to show an invasion or appropriation of some valuable **property right** and Missouri precedent held that visibility is **not** a valuable property right. As Scott's only claim regarding the sound wall was a loss of visibility, the Court concluded that there had been no invasion or appropriation of his property rights and hence Scott had suffered

¹ An inverse condemnation proceeding is one where the government entity did not initiate a condemnation proceeding, but rather the property owner had to initiate their own lawsuit to seek compensation for a condemnation.

no injury. Consequently, the Eastern District upheld the lower court's dismissal of his action.

C. Eminent Domain Cases in the Federal Courts applying Missouri Law

1. *Barfield v. Sho-Me Power Elec. Coop*, No. 2:11-cv-04321-NKL, 2018 U.S. Dist. LEXIS 60526, 2018 WL 1747333 (W.D. Mo. Apr. 10, 2018)

This case concerned a class action lawsuit involving the valuation of easements. Sho-Me Power Cooperative installed fiber-optic cables along the electric transmission easement it had on land owned by members of the plaintiff class. Sho-Me Power did not possess an easement to cross plaintiffs' land for purposes of telecommunications. Further, the evidence showed that Show-Me Power intentionally developed the fiber-optic lines to have more capacity than was necessary to meet its own internal communication needs and sold the excess capacity to its new subsidiary, Sho-Me Technologies, LLC, to operate a telecommunications business. The members of the plaintiff class brought suit for both trespass and unjust enrichment.

The trial court originally granted the plaintiff class's summary judgment on liability for both the trespass and unjust enrichment claims. The plaintiffs' then proceed to trial to on the unjust enrichment claim and were awarded \$79,014,140 in damages. Show-Me Power appealed the case to the Eighth Circuit. The Eighth Circuit reversed the trial court's grant of summary judgment on the unjust enrichment claim but affirmed summary judgment on the trespass claim and remanded the case (*Barfield v. Sho-Me Power Elc. Coop.*, 852 F.3d 795 (8th Cir. 2017)). At a second trial, the jury found Show-Me Power liable for \$129,211,337 in compensatory damages and \$1,300,000 in punitive damages. Show-Me Power responded by filing a motion under Federal Rule 50(a) (judgment as a matter of law) claiming insufficient evidence to support the jury's verdict.

The trial court ruled on the Rule 50(a) motion by first confirming that the trespass was temporary and not permanent. This distinction was important because a permanent trespass entitled the land owner to damages based on the change in the fair market value to the land (which Sho-Me claimed would most

likely have been nominal) while a temporary trespass entitled the land owner to recover the fair market rental value. Because the fiber-optics line in question could easily be removed, the court ruled that the trespass was temporary and thus that the plaintiffs were entitled to the rental value. The trial court then went on to hold that the proper rental value to measure was the rental value of the land for commercial telecommunications use and found the data underling the plaintiffs' expert witness was sufficient to support the verdict. Finally, the trial court determined that there was enough evidence to support a granting of punitive damages given that Sho-Me clearly knew that they lacked the right to place fiber-optic cables across the plaintiffs' land and thus acted with "reckless indifference" to the plaintiffs' rights. The trial court thus denied Sho-Me's Rule 50(a) motion.

D. 2017 Eminent Domain/Condemnation Data From State Courts Administrator

Condemnation Filings from 01/01/2018 to 12/15/2018				
County	Associate Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn State	Grand Total
Adair County		6		6
Barton County		1		1
Boone County		1		1
Buchanan County		1		1
Christian County			2	2
City of St Louis		2		2
Clay County		3	1	4
Cole County		1		1
Dunklin County		1		1
Greene County		2		2
Jackson County		3	1	4
Jefferson County	1			1
Knox County		7		7
Lewis County		2		2
Marion County		2		2
Saline County		1		1
Schuyler County		3		3
St. Charles County		4		4

St. Louis County		8	1	9
Taney County		1		1
Vernon County		1		1
Warren County		1		1
Grand Total	1	51	5	57

Condemnation Dispositions from 01/01/2018 to 12/15/2018				
County & Disposition	Associate Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn State	Grand Total
Audrain County		1		1
Dismiss by Ct w/ Prejudice		1		1
Boone County		1		1
Tried by Court- Civil		1		1
Cass County		3		3
Other Final Disposition		3		3
Christian County			1	1
Dismissed by Parties			1	1
City of St Louis		1		1
Dismissed by Parties		1		1
Clay County		2	2	4
Dismissed by Parties		1		1
Other Final Disposition		1	2	3
Cole County		1		1
Tried by Court- Civil		1		1
Greene County		3		3
Other Final Disposition		2		2
Tried by Court- Civil		1		1
Jackson County		9		9
Consent Judgment		1		1
Dismiss by Ct w/o Prejudice		1		1

Dismissed by Parties		3		3
Other Final Disposition		3		3
Tried by Court-Civil		1		1
Jefferson County	2	1		3
Consent Judgment	1			1
Dismiss by Ct w/o Prejudice	1			1
Dismissed by Parties		1		1
Marion County		1		1
Change of Venue		1		1
Nodaway County		1		1
Dismissed by Parties		1		1
Pike County			1	1
Dismiss by Ct w/o Prejudice			1	1
Platte County		2		2
Dismiss by Ct w/ Prejudice		1		1
Tried by Court-Civil		1		1
Schuyler County		2		2
Dismissed by Parties		1		1
Tried by Court-Civil		1		1
St. Charles County		7	1	8
Dismiss by Ct w/o Prejudice		1		1
Dismissed by Parties		5		5
Other Final Disposition		1	1	2
St. Louis County		11	1	12
Dismiss by Ct w/ Prejudice		1		1
Dismissed by Parties		7	1	8
Probate Ord Close File Misc		1		1

Tried by Court-Civil		1		1
Uncontested		1		1
Vernon County		1		1
Tried by Court-Civil		1		1
Warren County		1		1
Dismiss by Ct w/o Prejudice		1		1
Webster County		1		1
Other Final Disposition		1		1
Grand Total	2	49	6	57

E. Department of Transportation Data

The Missouri Department of Transportation acquired 353 parcels of real property for state projects in Calendar Year 2018 to date.² 351 were resolved by negotiation (191 donated & 160 negotiated), 2 required a condemnation lawsuit. Property owner satisfaction rating, overall, for CY 2018 to date was a 4.83 out of 5.³

F. Conclusion

The protection and preservation of private property rights are fundamental and vital objectives of law in our society. As James Madison stated:

It is sufficiently obvious, that persons and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property,

² Data taken on December 14, 2018.

³ As compared to a 4.80 in 2017, 4.63 in 2016, 4.7 in 2015, 4.47 in 2014, 4.8 in 2013, 4.6 in 2012, and 4.8 in 2011.

which is a natural right, gives to property, when acquired, a right to protection, as a social right.⁴

Therefore taking of private property from individuals and businesses through eminent domain is an exercise of solemn authority. In observance of this duty, the State of Missouri established this office as a resource for the benefit its citizens and to provide guidance in the exercise of their most sacred rights. While most property owners subjected to eminent domain would benefit from legal representation, which they are free to avail themselves, for many property owners hiring an attorney to represent their interests in a condemnation proceeding is not within their budget or not worth the cost when the taking is minimal. For these underrepresented Missourians, the Ombudsman's guidance is most valuable.

For questions or concerns about this report, please contact Marc Poston, Acting Public Counsel, at (573)751-4857.

Respectfully Submitted,

/s/ Marc Poston

Acting Public Counsel

Ombudsman for Property Rights
Office of the Public Counsel
Post Office Box 2230
Jefferson City, MO 65102
(573) 751-5318 (Telephone)
(573) 751-5562 (Facsimile)

⁴ James Madison, fourth President of the United States, "First Speech in the Virginia Convention of 1829" (Dec 2, 1829).
<http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-1924>.